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Chief, Legislation Division, OGC

SUBJECT FOIA/Freedom of Information Protection Act of 1983

Attached for your information are floor statements made by Senators Durenberger, Moynihan, Biden, Mathias and Leahy upon introduction of S. 1335, a Bill which would in effect restore the identifiable damage and balancing tests for classification of national security information which were eliminated when Executive Order 12356 was issued last year. The Bill also was co-sponsored by Senators Cohen and Huddleston.

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Attachment

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sylvania (Senator HEINZ) have proposed comprehensive reforms to the act which address many of the concerns observers have had about this measure. There is much in these gentlemen's proposal which I will support. The amendments I am introducing today represent constructive suggestions for further improvements.

The controversies that have surrounded the Export Administration Act have, for the most part, been a result of a fundamental tension in the act. On the one hand, the act is designed to help insure our domestic security by denying the benefits of our technology to other countries which are hostile to us. There is no dispute over the value and necessity of doing this. We must never put ourselves in the position of selling the shovels to those who would bury us.

At the same time, it is the policy of this country to promote the development of export markets as a way of capturing the benefits-of-scale economies in production and supporting domestic employment. Again, the value of the fundamental goal is not at issue. Exports have become an increasingly important component of our economic strength, and the United States must continue to pursue an aggressive policy of encouraging exports of domestically produced goods.

Naturally, these goals frequently come into conflict. This has always been recognized, and one of the purposes of the Export Administration Act was to establish a structure to permit the resolution of these conflicts. In recent years, however, it has become clear that the structure under the present act is insufficient to the task. My goal in introducing these amendments to the Export Administration Act is not to change in any fundamental way our national policy on what we provide to countries which are our adversaries. Rather, my goal is to make more efficient the structure for resolving the many necessary conflicts which of necessity will arise in implementing the act.

It is my belief, Mr. President, that in recent years a number of provisions of the Export Administration Act have led to unwarranted interference with export promotion by private companies. Many firms have found it difficult to receive permission to export products which are in no way militarily threatening to us. Many companies have experienced long and unnecessary delays in receiving permission to export, resulting in a cloud over our international reputation as dependable suppliers. The amendments I am offering are intended to improve the administration of the act and to facilitate the export of goods when it is clearly in our interest to engage in such exports. My amendments are not intended to weaken or eliminate safeguards on the export of American technology when such safeguards are important to our national security.

Briefly, Mr. President, the key features of the bill I am introducing here, and the problems they are intended to address, are as follows:

This amendment would terminate the need to acquire an export license for the purpose of exporting to our allies who participate with us in a multilateral export control agreement. This does not affect items on the military critical technologies list, for which licenses would still be required. It would remove an unnecessary barrier, however, to trade between the United States and its Western allies.

The amendments would also authorize comprehensive operations licenses, which would eliminate the need for companies to make repeated application for export licenses for goods already approved in the past for transfer to foreign subsidiaries or partners of U.S. companies.

My amendments would also remove an ineffective and unwarranted feature of the existing act, which permits items which are freely available in world markets to nonetheless be placed on the military critical technologies list, and hence embargoed from trade. There is no sense in forbidding the export of American products which could be competitive on the world market on military grounds, if comparable products are readily available from other sources.

My amendments would also provide for the sanctity of contracts between exporters and foreign customers, by forbidding the imposition of export controls on exports pursuant to a contract entered into prior to the imposition of such controls. This is basic good business. Regardless of the inherent quality of American products, and the degree of favorableness of the terms on which they are offered, American companies will not be able to compete in world markets if they are regarded as unreliable suppliers. Delivering on contracts signed is the fundamental requirement of being a reliable supplier, and my amendments would insure that contracts are not violated after they are entered into. Once again, this does not inhibit our national security, since the freedom of the President to act when our national security is at stake is still preserved.

A related issue is the authority of the President to impose export controls for foreign policy purposes, as distinct from national security purposes. In general, I am dubious about the efficacy of export controls as a foreign policy tool. I do not reject them completely. I think there may be instances where they are necesary and justified. But I believe we have been too ready to appeal to such measures in the past, and my amendments would set forth additional criteria which must be met before export controls are imposed for foreign policy purposes. I believe this is a healthy requirement for Congress to impose, since it insures that such controls will not be exercised for light or transient reasons.

The final major provision of my amendments has to do with the determination of foreign availability. It requires the Secretary of Commerce to review on a continuous basis the foreign availability of goods subject to export controls. If a good is found to be available in foreign markets, then the Secretary may not require an export license to export the good, unless the President determines that such a control is essential for foreign policy purposes. Also, it requires the Secretary to accept the representations of the exporter as to the foreign availability of the commodity in question, unless there exists reliable evidence to the contrary.

My amendments also make other provisions which the Banking Committee will want to consider. These include a provision prohibiting imposition of export controls solely because a good contains microprocessors, and the extension of certain short-supply provisions. These are somewhat narrower amendments, and I will not go into them in detail here.

I believe the amendments I have offered here represent a significant step in the right direction in terms of allowing our domestic producers to compete freely on world markets, while still preserving those export control provisions which we genuinely require for our national security. I look forward to a productive discussion within the Banking Committee, and to passage this year of a measure which will constitute a significant improvement to the Export Administration Act.●

By Mr. DURENBERGER (for himself, Mr. BIDEN, Mr. COHEN, Mr. HUDDLESTON, Mr. LEAHY, Mr. MATHIAS, and Mr. MOYNIHAN):

S. 1335. A bill to provide certain standards for the application of the Freedom of Information Act exemption for classified information; to the Committee on the Judiciary.

FREEDOM OF INFORMATION PROTECTION ACT OF 1983

● Mr. DURENBERGER. Mr. President, I am introducing the Freedom of Information Protection Act of 1983 in order to protect the Freedom of Information Act from the sort of damage that only faceless bureaucrats can inflict.

The problem in this case is Executive Order 12356 on National Security Information, which was signed last April. Ed Meese, the counselor to the President, was right when he described the draft Executive order as "the fault of an overzealous bureaucracy trying to have its own way." It was drafted by security bureaucrats who think only of how to keep everything secret, and by legal bureaucrats who think only of how to get away with filing fewer affidavits.

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Nobody gave much thought to the public's right to know what their Government is doing. Nobody worried about maintaining public support for the governmental secrecy system, which is essential if we are ever to stem the flow of leaks that is our most real security problem. Nobody thought to buttress public support for judges who have almost always allowed the Government to withhold information that it says should be kept secret.

A year has gone by now, and what has happened? The public is ever more cynical about governmental secrecy. Bureaucrats and policymakers are ever more cynical about the information they control. Instead of sensible declassification we have selective leaks, both official and unofficial. And to fight those leaks, we now have a Presidential directive that calls for more lie detectors and more censorship. Is that the best we can do?

The Freedom of Information Protection Act will make sure that information withheld from FOIA petitioners under the exemption for classified information meets two tests that used to apply to all classification decisions: First, that it be information the disclosure of which could reasonably be expected to cause identifiable damage to national security; and, second, that the agency withholding the information first consider the public interest in disclosure. It will also put into legislation, explicitly and for the first time, limits on judicial review of the balancing test between the public interest in disclosure and the need to protect information.

Neither the identifiable damage standard nor the balancing test changes the types of information that the Government can keep secret. Rather, they will reinstate the requirement that decisionmakers think about each individual case instead of using broad rules of thumb.

The limit on judicial review of the balancing test will prevent judges from second-guessing the agency determination that the need to protect information does outweigh the public interest in disclosure. Government lawyers had feared such judicial meddling. This was their major reason for removing the balancing test from the Executive order. My bill will solve that problem so that we can maintain the balancing test.

Mr. President, the Freedom of Information Act is especially worth defending from the misguided arrows of last year's Executive order. FOIA is where the journalist and the historian turn when they seek particular information so as to inform the public. FOIA is where parents and widows turn when someone has died in the line of duty and they want to know why. FOIA and the Privacy Act are what the concerned citizen uses to find out whether the Government has been watching him. In protecting FOIA, we are protecting the most basic element of open Government.

By protecting the Freedom of Information Act, we also send a signal that moderation and thoughtfulness are the keys to effective security. Past Executive orders have been clearly based on that premise. Executive Order 12065 contained the identifiable damage standard and the balancing test, as well as automatic declassification for most information. Executive Order 11652, which applied during the Nixon and Ford administrations began as follows:

The interest of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the Executive branch.

Section 4 of that order added:

Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and overclassification shall be avoided.

Section 13 called for administrative reprimands and corrective action in the event of unnecessary classification or overclassification. The Nixon and Ford order also had automatic declassification, with significantly fewer exceptions than under the Carter order.

Thus the two previous orders both sent the bureaucracy a message that the goal was openness. Even as the Government keeps information secret, it must minimize that secrecy—both to insure an informed citizenry and to maintain public acceptance of secrecy where it is needed.

Last year's order sent the opposite message. It told bureaucrats to be rigid. It allows them to ignore the public interest in disclosure. In the end, it can only undermine public confidence in the secrecy system these bureaucrats are running.

My bill will prevent excessive secrecy from undermining the Freedom of Information Act. It will relieve the Government of the fear of judicial meddling when Government officials take the time to consider the public interest in disclosure. It will tell the bureaucrats—and reassure the public—that their Government will withhold information only after careful thought. This can only benefit us all.

Mr. President, I am especially pleased to note cosponsorship of this bill by six fine colleagues, all of whom are current or former members of the Intelligence Committee. It is particularly gratifying to have as my principal partner Senator LEAHY of Vermont, who is both vice chairman of my Subcommittee on Legislation and Rights of Americans and ranking on Senator HATCH's Constitution Subcommittee.

I ask unanimous consent to insert in the RECORD at this point an analysis of the Freedom of Information Protection Act of 1983 and the text of the bill.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

ANALYSIS OF THE FREEDOM OF INFORMATION PROTECTION ACT OF 1983

This bill amends the Freedom of Information Act (5 U.S.C. § 552) in two ways. Section 3 amends the (b)(1) exemption for classified information to require that the information meet both the "identifiable damage to national security" standard and the "balancing test" that the need to protect the information outweighs the public interest in disclosure. Section 2 amends the (a)(4)(B) language on de novo review to limit the district courts' review of the "balancing test" to ascertaining that the test was in fact made.

SECTION 3

The beginning of this section and subparagraph (A) repeat the language of the current (b)(1) exemption. Subparagraphs (B) and (C) are new requirements.

Subparagraph (B)

Subparagraph (B) adds the "identifiable damage to national security" standard that was deleted in subsections 1.1(a)(3) and 1.3)(b) of the new Executive Order on National Security Information.

The Executive Branch fears that "identifiable damage" might be interpreted by judges as a higher standard than were "damage to the national security." The cases cited by Executive Branch officials, however, make no mention of such interpretations. The only judicial mention of the difference between "damage" and "identifiable damage" is in *Baez v. U.S. Department of Justice*, where Circuit Judge Wilkey stated that "that difference is not substantial.".

The practical effect of this amendment will not be to require a higher standard in FOIA declassification decisions, but rather to require a more thoughtful approach to such decisions. It will require decisionmakers to look at the facts in each case, rather than relying upon a broad sense that some undefinable "damage" could be caused by the release of the information.

Subparagraph (C)

Subparagraph (C) adds the requirement that decision-makers in FOIA cases involving classified information determine that "the need to protect the information outweighs the public interest in disclosure." This language is taken from the statement of declassification policy that was deleted in the new Executive Order. The determination is commonly known as the "balancing test.".

Executive Order 12065 required that "a senior agency official" make any "balancing test" decisions and left it to the agencies to decide which cases should be referred to such a senior official. The CIA, for example, issued a Regulation that set forth six categories of information that should be forwarded to a higher official. Each piece of information was reviewed, therefore, to see whether it fell within the six categories. The effect of subparagraph (C) will be to maintain a system of this sort for FOIA cases. The precise criteria will not be subject to judicial review, due to Section 2 of this bill.

SECTION 2

This section amends subparagraph (a)(4)(B) of the Freedom of Information Act, which provides for de novo review by the United States district courts when a person sues to enjoin an agency from withholding material that is the subject of an FOIA request.

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Paragraph (2) of this section limits judicial review of the "balancing test" to "ascertaining whether the agency withholding such records made the determination that the records are matters described in" section 3, subparagraph (C). The effect of this amendment is to allow judges to ask whether the "balancing test" was made, but not to question the result of that balancing. This amendment disposes of a significant Executive Branch concern, that judges might second-guess the balancing performed by agencies. It was that concern that led the Executive Branch to delete the "balancing test" from the Executive Order.

S. 1335

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Freedom of Information Protection Act of 1983."

SEC. 2. Subparagraph (B) of section 522(a)(4) of title 5, United States Code, is amended—

(1) by inserting in the second sentence after "court shall" a comma and "except as provided in the third sentence of this subparagraph"; and

(2) by adding at the end thereof the following new sentence: "In the case of agency records withheld under the exemption set forth in paragraph (1) of subsection (b), the court determination with respect of subparagraph (C) of such paragraph shall be limited to ascertaining whether the agency withholding such records made the determination that the records are matters described in such subparagraph.".

SEC. 3. Paragraph (1) of section 522(b) of title 5, United States Code, is amended to read as follows:

"(1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are—

"(A) in fact properly classified pursuant to such Executive order,

"(B) matters the disclosure of which could reasonably be expected to cause identifiable damage to national security, and

"(C) matters in which the need to protect the information outweighs the public interest in disclosure.".●

● Mr. MOYNIHAN. Mr. President, I rise in support of the Freedom of Information Protection Act of 1983, which I have joined the distinguished Senator from Minnesota, Senator DURENBERGER, in cosponsoring. The bill is well titled, for it is indeed designed to protect the public's access to information from being barred by unwarranted national security classifications. It would accomplish this purpose by adding two tests to the current exemption in the Freedom of Information Act for information classified in the interests of national security pursuant to Executive order.

The first would condition the exemption on a finding that the information could reasonably be expected to cause "identifiable" damage to national security

The second would require consideration whether the need to protect the information outweighs the public interest in disclosure.

The tests commonly known as the identifiable damage and balancing tests were made a part of classification criteria by President Carter in Executive Order 12065 in 1978. After considering a draft revision of this order proposed by the Reagan administration, the Select Committee on Intelligence recommended that these principles be retained. Unfortunately, the Executive order issued by President Reagan on April 2, 1982, Executive Order 12356 dropped these tests.

Why this action was taken has not been adequately explained. Indeed, it conflicts with the views expressed by the President's own counselor, Mr. Meese, who told the Washington Post that he has found "way too much classification" and "that this is one of the problems of Government" (July 7, 1981, p. A-15). Mr. Meese is correct. As former Justice Stewart noted in the Pentagon Papers case, the hallmark of a truly effective classification system "would be the maximum possible disclosure, recognizing that secrecy can best be preseved only when credibility is truly maintained."

President Reagan's Executive order undermines this objective by removing standards which, in effect, require Govenment officials to have a reasonable basis for classification decisions. The new order signals to the bureaucracy—which Mr. Meese told the Post has "tried to expand classification" (Mar. 15, p. A-11)—that it may apply secrecy stamps without articulating a damage rationale and without considering public interest factors.

Mr. President, I regret that this is not the only instance in which the administration has unsettled public confidence in the Government's system for protecting secrets. On March 11, 1983, the President issued a directive intended to prevent unauthorized disclosures of classified information through leaks to news media. A singular feature of this directive is that it requires prepublication clearances of articles and books written by policy-making Government employees after they leave Government, if they have had access to sensitive compartmented information (SCI)—that is, information to which access is limited to protect sources and methods. Suffice it to say that there are as many as 200,000 people with SCI clearances, including a large number of officials of the Departments of Defense and State and the White House—people who can and do contribute much to public debate after they leave office. As Mr. Floyd Abrams, a distinguished authority on the first amendment observes:

> Some of the most important speech that occurs in our society would be subjected to governmental scrutiny and that, if the government in power decided that something could not be written or said, to judicial review.

For some time, CIA and other intelligence agencies have obliged their former employees to seek review prior to public disclosure of any information concerning intelligence activities. This is a reasonable rule given the complete immersion of their personnel in the world of secrecy and their perhaps not altogether keen sense of what is and is not classified. But officials at Defense and other nonintelligence agencies, while having access to sensitive information, must and do address vital national security issues without using classified information. They do this every day at congressional hearings, in speeches and press conferences. Moreover, it has not been uncommon for these officials to write books after they leave the Government and to submit, on a voluntary basis, all or portions of the manuscripts for prepublication review by their former employers.

May I say that this sensible practice of some of our former leaders suggests a basis for establishing a system that relies primarily upon voluntary cooperation—one in which compulsory review is strictly limited to cases in which the former Government official knows or is uncertain that his manuscript contains sensitive classified information. It strikes me as curious that the new directive appears to call for a mandatory, and most likely, inefficient censorship bureaucracy. This from a President who staunchly opposes intrusive big government, and indeed, advocates private voluntary action, as an alternative to governmental programs, to meet basic social needs.

The directive's implementing regulations have yet to be written. I urge my colleagues to make their views known to the administration so the new rules adequately accommodate first amendment values.

Late last month, we also learned that the March 11 directive was based on an interagency study which proposed prison terms for offenders. Now this could readily lead us to the point where at any given moment half the Cabinet is in jail. Mind, there have been times in the recent past where we almost reached that point without the aid of any special legislation. Even so, one wonders if the Republic is really ready for such an experiment.

With something such in mind, on March 22 I wrote the President enclosing a more or less routine press report of that day citing "senior Reagan administration" officials and suchlike letting us in on details of "low altitude flights by United States spy planes" flying about Central America, I said I assumed there would be a "thorough internal executive branch investigation of this matter" and asked if the Intelligence Committee might be favored with a copy of the findings. On May 5, I wrote a similar letter to the President following additional apparent leaks of classified information in press reports sourced to administration officials. I have yet to hear back on the results.

If the investigative procedures of the directive are followed, I believe the administration will learn that the sources of leaks are more likely to be Presidential advisers, rather than defense or intelligence professionals.

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This, at least, would appear to have been the pattern of previous administrations. That is where the problem seems to be.

The new directive calls for each agency to adopt regulations concerning contacts with news media. As vice chairman of the Select Committee on Intelligence, it has been my practice to speak to the press on intelligence matters only on the record. I would commend this practice to the executive branch. It certainly would help us determine which disclosures are authorized or not.

Mr. President, the Freedom of Information Protection Act does not address all of these concerns. It is a modest bill, but nonetheless important. It would emphasize the intent of Congress that the executive branch maintain a high standard we hope will also be employed in all aspects of its public information policies. I strongly urge that my colleagues support this legislation.●

● Mr. BIDEN. Mr. President, I would like to express my strong support for Senator DURENBERGER's Freedom of Information Protection Act of 1983 and to urge its prompt consideration by the Senate. Senator DURENBERGER is to be congratulated for his sponsorship of this, not only symbolically but also substantively, important piece of legislation.

It is difficult to avoid cliches in stating the importance that an informed and free citizenry has had in the history of the United States. Certainly these qualities and the full functioning of the democratic process depend on making the maximum amount of information available to the public consistent with the needs of the national security for legitimate classification.

The initial enactment of the Freedom of Information Act in 1966 gave clear expression to the value which the United States attaches to open government. It also created a powerful tool for the American people to use in extricating information from the labyrinthian corridors of government.

The fact that the United States has Executive orders, public documents, governing the classification of information further expresses the importance of public access to information in the United States. Surely, the United States is one of a very few countries that sets forth in a public document the exact procedures to be followed and criteria to be met in the withholding of information from the public. As Senator DURENBERGER has already pointed out, there has been a clear trend in the evolution over the past 30 years of Executive orders governing the classification activities of the U.S. Government. Since the administration of President Eisenhower, that trend had been to reduce the amount of information which would be classified and, therefore, out of reach of the American public.

Unfortunately, President Reagan's Executive Order 12356 on national security information reversed this trend toward greater availability of governmental information. In two areas in particular, Executive Order 12356 was disappointing. First, it dropped the previously minimal requirement that before information could be classified at all there must be the reasonable expectation that at least identifiable damage would result. Now there is only a requirement for a reasonable expectation of damage; there is no requirement to specify exactly what damage the classifying authority expects.

Second, Executive Order 12356 dropped the so-called balancing test that previous Executive orders required to be applied before information could be classified. Under that balancing test, even though information might be properly entitled to classification, if the American public's interests in the disclosure of the information outweighed the national security interests in its classification, the Government officials could decide to keep the information unclassified.

I am fully aware of the need to classify and restrict access to information the disclosure of which really could cause damage to vital U.S. intelligence sources and methods. Like many other members of the Intelligence Committee, I have argued that the U.S. Government needs to take specific, tough, and effective steps to make sure that objectively important and sensitive secrets that the Government has are kept secret. Furthermore, I am sympathetic to the arguments that some groups in both the law enforcement and business communities have made about the need to adapt, in a most cautious fashion, the Freedom of Information Act to meet their legitimate concerns. So, it is not the case that I would criticize any and all attempts to improve the information security practices of the United States.

However, these attempts and these adaptations must be prudent. They must be well balanced. They must rigorously take into consideration the exact problem to be solved and the narrowest governmental authority necessary to address this problem.

I regret to say that the Reagan administration's steps in the area of what is euphemistically described as information management fail these tests. It is an ironic but established fact that this administration, with its scorn for the values of Government and the people who work in it, has tried on a wide range of fronts to limit the access of the American people to information about the workings of Government.

Numerous agencies have adopted regulations restricting communication between agency personnel and the press. Legislation has been sent to the Congress that would weaken the Freedom of Information Act. As already indicated, Executive Order 12356 on national security information was a stroke against the currents of 30 years of more narrowly defined classification authorities. On March 11, 1983, the President issued a "Directive on Safeguarding National Security Information" which was, at best, a meat-ax attack on maladies in need of surgical precision.

I am afraid to say that through all these acts, the administration has given vent to crude, ideological impulses against people who would dare to question its conduct of Government, its management of Federal agencies. What we need instead are clear-eyed, dispassionate solutions to specific and serious problems of unauthorized disclosure of truly sensitive information.

An article in the April 19, 1983, New York Times entitled "The Problem of Keeping So Many Secrets Secret" estimated some dimensions of the problem of excessive, improper classification. The article describes a survey, by GSA's Information Security Oversight Office, of classification in 1980, the year of the most recent survey. According to that survey, in 1980, 7,150 officials had original authority to classify information as secret, but they had delegated that authority to 133,000 other officials. The article states:

> In a random check, the oversight office estimated that 600,000 papers had been classified without authority; another 800,000 had been classified unnecessarily.

It seems as though we are getting in a real muddle in this country in which we have far too much classification and restriction of information but too little protection of secrets. Of course, one highly desirable remedy for this problem would be for the Congress to enact a classification statute. To do so would be to put on firmer ground the entire classification process. It would avoid the instability inherent in having each new Presidential administration reviewing and rewriting policy on something as important as the availability of Government information to the American people.

Until that time when the United States does have a classification statute, we must rely on the diligence and farsightedness of individuals like Senator DURENBERGER who can supply specific solutions like the Freedom of Information Act of 1983.●

● Mr. MATHIAS. Mr. President, I am pleased to join with Senator DURENBERGER and other of my colleagues to introduce the Freedom of Information Protection Act.

This legislation is significant in two respects. First, it would correct some of the problems which have arisen from the issuance last year of Executive Order 12356. This most recent directive on security classification represents a step backward from the efforts of previous administrations to deal with the serious problem of overclassification. A recent report of the House

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Committee on Government Operations lists some of the costs of such excessive secrecy. The committee noted that:

Overclassification results in unnecessary restrictions on the public availability of information, a reduction in public confidence in the classification system, a weakening of the protection for information that is truly sensitive, and an increase in the cost of government.

The bill which we introduce today would reinstate a simple but important safeguard against overclassification which was eliminated by Executive Order 12356: Information should not be classified unless identifiable damage to the national security, which outweighs the public interest in the free flow of information, is likely to result from its disclosure. The Freedom of Information Protection Act would codify this commonsense principle.

The measure is important in another way as well. It manifests a growing congressional interest in Government information policy in general, and security classification policy in particular. The entire complex edifice of the classification system is built on shifting legal sands. The intricate provisions of the mass of Government secrecy regulations derive their authority, not from a specific statute enacted by the Congress, but from the implied constitutional powers of the Chief Executive.

I hope that the introduction of this legislation will call into question the long history of congressional passivity on issues of classification policy. Legislative action in this field might clarify the proper relationship among the three branches of Government on information policy matters. It also could strengthen the protection of legitimate secrets, by forging a consensus on the appropriate standards for classification, and by increasing public understanding of and acceptance for the needs of the secrecy system. The Freedom of Information Protection Act, in my view, is an important first step in this process. I commend the senior Senator from Minnesota for taking the initiative in this matter.●

● Mr. LEAHY. Mr. President, the balance between the needs of national security and the public's need to know has always been a delicate one. The Freedom of Information Act established a presumption in favor of access, constrained only by a series of narrowly drawn exemptions, where the need to keep Government information secret clearly outweighed the public's right to know.

President Reagan's Executive order on classifying national security information had the effect of reversing that presumption. In doing so, it did more than just to create the risk that zealous officials will overclassify. OFIA has only worked because the burden on an agency to justify a decision in favor of secrecy puts a mammoth Government and its citizens on an equal footing. Shifting the burden to the public will have the inevitable effect of upsetting that balance and giving Government its natural advantages in the fight for access: size and resources.

Congress now has the opportunity, and I believe the strongest duty, to restore the FOIA exemption for national defense and foreign policy matters to its former meaning and to maintain the presumption of openness. And yet, building on more than 15 years of experience with the act, we can make those changes in a way that perpetuate and indeed strengthen the protection required for documents that clearly and legitimately require classification on security grounds.

Senator DURENBERGER and I are proposing an amendment to the Freedom of Information Act that would require an agency to find that national security documents withheld "could reasonably be expected to cause identifiable damage to national security." This amendment restores the identifiable damage test contained in Executive Order 12065 for FOIA declassification decisions.

Second, our proposal would make explicit the kind of balancing test that has always characterized critical agency decisions under FOIA. Our bill would exempt national security matters "in which the need to protect the information outweighs the public interest in disclosure." Courts reviewing agency compliance with the balancing test requirement would not be able to substitute their judgment for that of the decisionmaker but would be limited to ascertaining that the test was in fact made. This should clearly answer the criticism of those who fear that judges will impose unreasonably high standards of specificity and thereby harm national security.

I always hesitate to urge my colleagues to codify commonsense, as this bill admittedly does. But the President's Executive order has made this proposal necessary. Statutes like the Freedom of Information Act work best when they enjoy the good will of the administration and the agencies charged with their implementation. In the absence of evidence that the presumption of openness will be held high as a standard, the present bill becomes crucial.

The Executive order is not the only example of this administration's narrowness toward the principle of open access. On April 12, 1983, I introduced the Freedom of Information Improvement Act of 1983, which addresses some of the major concerns that requesters have under the current law, particularly as it is being construed. The Judiciary Committee is hard at work dealing with many of the concerns raised in my bill, and there is every prospect for a fair and workable result at the conclusion of that process.

Similarly, I think that both Government and requesters would benefit from adopting the careful standard Senator DURENBERGER and I have set forth in the present bill. If this standard becomes part of the FOIA, both national security and the principle of openness will be the beneficiaries.

I want to offer my personal thanks to Senator DURENBERGER, whose role on the Intelligence Committee has been vital and whose perceptions about the balance between the needs of security on the one hand and the public's right to know on the other have been an example to all of us.●

By Mr. DURENBERGER (for himself, Mr. HATCH, Mr. HEINZ, Mr. DANFORTH, Mr. KENNEDY, and Mr. INOUYE):

S. 1336. A bill to make permanent the exclusion from gross income of national research service awards; to the Committee on Finance.

NATIONAL RESEARCH SERVICE AWARDS

Mr. DURENBERGER. Mr. President, today I am introducing along with Senators HATCH, HEINZ, DANFORTH, KENNEDY, and INOUYE legislation to bring a permanent solution to the issue of the tax status of awards granted by the Public Health Service for biomedical research training—national research service awards (NRSA's). In 1977 the Internal Revenue Service ruled that NRSA's were not scholarships because recipients must engage in health research or teaching or equivalent service for a period equal to the length of the award. Thus, NRSA's did not qualify under section 117 of the code exempting the entire amount of the scholarship for degree candidates and up to $300 per month—$3,600 per year—for a total of 3 years for nondegree candidates.

Repeatedly since that time Congress has passed legislation to treat NRSA's as scholarships under section 117. The latest extension expires at the end of this year. By providing for a permanent inclusion of NRSA's under section 117, the Congress would relieve itself of the burden of periodic extension of the moratorium on full taxation of the awards.

A permanent exemption would lift a burden not only from Congress but from the recipients of the awards. Even though the section 117 qualification expired at the end of 1981, Congress did not act until the Tax Equity and Fiscal Responsibility Act last year. That meant months of needless worry for recipients of the awards as they tried to stretch their limited dollars further to cover possible taxes on the awards.

Last year during Finance Committee consideration of TEFRA we agreed to make another limited extension of section 117 treatment. This temporary measure was taken so Treasury could complete a study of section 117 and the tax treatment of various Government awards. It now appears that Treasury may not be completing the

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